

Message Text

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ORIGIN L-02

INFO OCT-01 ARA-06 ISO-00 EB-07 IO-10 CIAE-00 DODE-00

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DRAFTED BY L/ARA:DAGANTZ:USOAS:PAMONTAVON:AVG

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L:MBFELDMAN (DRAFT)

USOAS:WSMAILLIARD(DRAFT)

ARA:AFISHLOW (DRAFT)

ARA/PLC:RBLOOMFIELD (DRAFT)

EB/IFD/OIA:RSMITH (DRAFT)

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P 242317Z JUN 75

FM SECSTATE WASHDC

TO ALL AMERICAN REPUBLIC DIPLOMATIC POSTS PRIORITY

USCINCSO PRIORITY

C O N F I D E N T I A L STATE 148693

E.O. 11652: GDS

TAGS: PFOR, ETRD, OAS, XM

SUBJECT: OAS MEETINGS ON ILLICIT CORPORATE PAYMENTS

REF: A) STATE 143322; B) STATE 120843

1. THE GENERAL COMMITTEE OF THE PERMANENT COUNCIL WILL TAKE UP ON FRIDAY OF THIS WEEK DRAFT RESOLUTION DISCUSSED REFTELS. AT YOUR DISCRETION YOU SHOULD DISCUSS MATTER WITH APPROPRIATE FOREIGN MINISTRY OFFICIALS, DRAWING ON INFORMATION PROVIDED BELOW AS WELL AS REMARKS OF US DELEGATE AND, AS NECESSARY, ON REF. B.

2. OAS ACTION INVOLVES TWO DISTINCT, ALTHOUGH RELATED, ISSUES - BRIBERY QUESTION AND BROADER MATTER OF RESUMPTION OF HEMISPHERIC EFFORTS TO DRAFT CODE OF CONDUCT RELATING TO TRANSNATIONAL ENTERPRISES.
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3. WE WILL, OF COURSE, JOIN IN CONDEMNATION OF BRIBERY AND ANY OTHER ILLEGAL PAYMENTS AS LONG AS CONDEMNATION IS EVEN HANDED CONDEMNING BOTH GIVERS AND TAKERS. ALSO, FAIR RESOLUTION SHOULD NOT IMPLY THAT ALL TNE'S ARE GUILTY

OF ILLEGALITIES. LASTLY WE BELIEVE THAT HOST COUNTRIES HAVE THE BASIC RESPONSIBILITY FOR PROMULGATING AND ENFORCING THE LAW AS TO WHAT TYPES OF PAYMENTS ARE ILLEGAL IN THEIR COUNTRY, AND THAT SPECIFIC CASES SHOULD BE DEALT WITH IN ACCORDANCE WITH THEIR OWN CIVIL AND PENAL LAWS AND WITH APPLICABLE CIVIL AND CRIMINAL PROCEDURES.

4. HOWEVER, THE BROADER QUESTION OF RESUMING DISCUSSION OF A CODE OF CONDUCT WITHIN THE OAS FRAMEWORK GIVES US SOME DIFFICULT PROBLEMS. SECRETARY KISSINGER INDICATED CLEARLY IN HIS MAY 1 HOUSTON SPEECH THAT THE US WAS PREPARED TO RESUME TNE EXERCISE PROVIDED THAT THERE IS A WILLINGNESS ON THE PART OF THE LATINS TO MAKE A SERIOUS EFFORT TO FIND A MUTUALLY ACCEPTABLE WAY TO DEAL WITH THE THORNY CALVO CLAUSE/DIPLOMATIC PROTECTION ISSUES IN A MANNER THAT DOES NOT PREJUDICE THE BASIC POINTS OF VIEW OF EITHER SIDE. IN THE AFTERMATH OF THE JANUARY SESSION OF THE TNE WORKING GROUP, DEPARTMENT HAD REACHED CONCLUSION THAT IT WAS TIME TO ASSESS WHETHER FURTHER PROGRESS ON PRINCIPLES OF CONDUCT COULD IN FACT BE MADE WITHIN THE HEMISPHERIC CONTEXT GIVEN THE ABOVE-MENTIONED DIVERGENCE OF LEGAL POSITIONS.

5. WE BELIEVE IT WOULD BE VERY DIFFICULT AT THIS TIME TO ACHIEVE A BASIC COMPROMISE ON THE HISTORIC DISAGREEMENT BETWEEN THE US AND LATIN AMERICA REGARDING THE RIGHTS AND OBLIGATIONS OF STATES WITH REGARD TO FOREIGN ENTERPRISES. THESE ARE IN ESSENCE THE SAME ISSUES ON WHICH AN ATTEMPT TO OBTAIN UNANIMOUS AGREEMENT ON THE UNCTAD CHARTER ON ECONOMIC RIGHTS AND DUTIES FOUNDERED; THEY GO TO THE ACTION OF GOVERNMENTS RATHER THAN THOSE OF TNE'S PER SE, AND THUS RAISE THE QUESTION OF WHETHER THIS CODE OF CONDUCT IS TO APPLY ONLY TO TNE'S OR TO THE GOVERNMENTS AS WELL, ANOTHER THORNY ISSUE IN THE LATIN AMERICAN CONTEXT. WE ASSUME THAT NEITHER THE US
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NOR LATIN AMERICA IS PREPARED TO GIVE UP ITS ESSENTIAL POSITIONS ON SUCH ISSUES AS RELEVANCE OF INTERNATIONAL LAW TO INVESTMENT DISPUTES, PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES, ETC. WE DO NOT EXPECT LATIN AMERICA TO GIVE UP THE CALVO DOCTRINE, NOR SHOULD LATIN AMERICA EXPECT THE UNITED STATES TO ACCEPT IT.

6. WE HAVE THEREFORE COME TO THE CONCLUSION THAT IF PROGRESS IS TO BE MADE IN THE OAS CONTEXT WE NEED TO APPROACH THIS COMPLEX ISSUE IN STAGES. HENCE WE PROPOSE A PHASED APPROACH IN WHICH THE FIRST STAGE WOULD BE TO WORK OUT MUTUALLY ACCEPTABLE LANGUAGE ON THOSE PRINCIPLES WHERE THERE IS SUBSTANTIAL AGREEMENT BETWEEN THE U.S. AND LATIN AMERICA. WE WOULD VIEW THESE AS SOME OF THE

BASIC PRINCIPLES ON WHICH A CODE OF CONDUCT SHOULD ULTIMATELY BE BASED. THESE WERE IDENTIFIED DURING THE TNE MEETINGS AS THOSE WHICH DO NOT INVOLVE THE CALVO DOCTRINE, INTERNATIONAL LAW, OR THE PERMANENT SOVEREIGNTY ISSUE. THIS PROPOSAL SQUARELY RAISES THE QUESTION OF

WHETHER THERE IS SUFFICIENT WILLINGNESS AMONG THE MEMBERS OF THE OAS TO DEFINE REALISTIC ATTAINABLE OBJECTIVES ON A STEP BY STEP BASIS OR WHETHER THEY WILL INSIST ON AN ALL-OR-NOTHING APPROACH WHICH WILL HAVE LITTLE PROSPECT OF SUCCESS.

7. WE BELIEVE THERE ARE PERSUASIVE REASONS FOR PURSUING THE APPROACH WE SUGGEST. FIRST, IT IS, AS WE HAVE INDICATED, A COURSE WHICH HAS A GOOD CHANCE OF ACHIEVING SOME PROGRESS. ENOUGH PROGRESS WAS MADE IN THE MFM WORKING GROUP ON TRANSNATIONALS TO SHOW THAT THERE IS A LIMITED SET OF PRINCIPLES ON WHICH AGREEMENT COULD BE REACHED. AMONG OTHER THINGS, A BALANCED PRINCIPLE DENOUNCING BRIBERY AND OTHER ILLEGAL PAYMENTS SHOULD POSE NO GREAT PROBLEM.

8. IF SUCH A SET CAN BE PRODUCED IN THE OAS EXERCISE IT WOULD HELP TO GENERATE SOME SENSE OF FORWARD MOTION, WHEREAS A FRUITLESS EXERCISE INCREASES FRUSTRATION FOR ALL OF US. SECOND, A SET OF PRINCIPLES PRODUCED IN THE OAS COULD BE MOVED INTO THE UN OPERATION WITH SOLID CONFIDENTIAL

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REGIONAL SUPPORT. HENCE THIS APPROACH MAY BE MORE COMFORTABLE FOR BRAZIL AND ARGENTINA WHO ARE LESS THAN ENTHUSIASTIC ABOUT TRYING TO PRODUCE A CODE OF CONDUCT IN THE OAS. FINALLY, SUCCESS IN THE FIRST STAGE OF A PHASED APPROACH MIGHT WELL CONTRIBUTE TO A BETTER ATMOSPHERE AND BETTER UNDERSTANDING OF HOW TO DEAL WITH SUBSEQUENT STAGES.

9. IF WE CAN GET SUFFICIENT LATIN SUPPORT FOR THIS APPROACH IT WILL ALSO BE EXTREMELY IMPORTANT TO HAVE AN BEGIN UNDERLINE AD HOC END UNDERLINE WORKING GROUP FOR THIS PURPOSE. WE DO NOT BELIEVE THIS MATTER CAN BE DEALT WITH PROPERLY BY THE PERMANENT COUNCIL. RATHER, DISCUSSION IS MORE LIKELY TO BE FRUITFUL THROUGH PRIVATE INFORMAL DISCUSSION AMONG PERSONS WITH EXPERTISE ON THE MATTER. HENCE WE WOULD LIKE TO COME AS CLOSE AS POSSIBLE TO THE KIND OF WORKING GROUP ESTABLISHED BY THE MFM. THIS WOULD NOT PREVENT INDIVIDUAL MEMBER GOVERNMENTS FROM DESIGNATING THEIR OAS REPRESENTATIVES TO PARTICIPATE IN THE WORKING GROUP. WE WOULD NOT LIKE TO SEE THE GROUP PUT UNDER AN UNREALISTIC TIME LIMIT. YET THERE IS BOUND TO BE A DESIRE TO GET SOMETHING BEFORE THE NEXT GENERAL ASSEMBLY, SO AT LEAST THE WORKING GROUP WILL HAVE TO

RENDER AN INTERIM REPORT TO SATISFY THAT DEMAND.

10. IT IS IMPORTANT TO EMPHASIZE OUR STRONG DESIRE TO DEFINE WITH THE LATINS AN APPROACH WHICH PROMISES SOME OBSERVABLE PROGRESS IN THIS COMPLEX AREA. THERE IS MORE

AT ISSUE HERE THAN POLITICAL POSITIONS ON A CODE OF CONDUCT. IF OAS MEMBERS ARE UNABLE TO DEFINE A CONSTRUCTIVE APPROACH TO THIS PROBLEM IT WILL AGAIN CALL INTO QUESTION IN THE PUBLIC MIND THE EFFECTIVENESS OF THE OAS. EXCEPT FOR PERU, WE HAVE ENCOUNTERED A REASONABLE ATTITUDE ON THE PART OF MOST OAS REPRESENTATIVES. HENCE YOUR APPROACH SHOULD BE BASED ON AWARENESS THAT WE ARE ENGAGED IN USEFUL DISCUSSIONS WHICH COULD BENEFIT FROM OFFICIAL NUDGES IN THE RIGHT DIRECTION, BUT YOU SHOULD NOT CONVEY THE IMPRESSION WE ARE TRYING TO PERSUADE HOST GOVERNMENTS TO OVERRULE THEIR OAS REPRESENTATIVES.
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11. FOR BUENOS AIRES: YOU SHOULD POINT OUT, PREFERABLY TO AMBASSADOR FIGUERERO, THAT THE U.S. HAS NOT TAKEN THE INITIATIVE ON THIS EXERCISE. RATHER, WE ARE ATTEMPTING TO RESPOND IN A POSITIVE AND CONSTRUCTIVE WAY TO THE DESIRE OF THE MAJORITY OF MEMBERS FOR SOME ACTION ON THE CODE OF CONDUCT. WE WOULD APPRECIATE HIS VIEWS.

12. FOR BRASILIA: WE ARE AWARE THAT THE GOB IS LESS THAN ENTHUSIASTIC ABOUT RESUMPTION OF THIS EXERCISE, BUT WE UNDERSTAND THAT IT IS NOT PREPARED TO MAKE ANY EFFORT TO HEAD IT OFF. WE WOULD HOPE, HOWEVER, THAT BRAZIL'S OAS REPRESENTATIVES COULD BE ENCOURAGED TO SUPPORT OUR EFFORTS TO ASSURE THAT THE EXERCISE IS CARRIED OFF BY AN AD HOC GROUP OF EXPERTS RATHER THAN BY THE PERMANENT COUNCIL PER SE.

13. RE LA PAZ 4309: WITHIN THE CONSTRAINTS OF HIS INSTRUCTIONS ORTIZ HAS BEEN REASONABLY HELPFUL AND HAS INDICATED THAT HE WANTS A RESOLUTION WHICH THE U.S. CAN SUPPORT. WE PREFER THAT YOU DISCUSS THE MATTER ORALLY WITH THE MINISTRY AND SEE NO REASON FOR A NOTE.

14. FOR LIMA: WE READ ALVARADO AS TRYING TO HANG ON AS OAS AMBASSADOR AND BELIEVE THAT, IF THE OTHER LATINS AGREE ON AN APPROACH, THEY WILL BRING HIM ALONG. WE ARE EXPRESSING OUR VIEWS TO ALVARADO, BUT BELIEVE THE FOREIGN MINISTRY SHOULD BE AWARE OF OUR POSITION. KISSINGER

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